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IN THE

Supreme Court of the United States

October Term, 1958

No. 424

JAMES E. MCDANIEL,

Petitioner,

against

M/S LISHOLT, her engines, etc. and A. S. LISE, her owner,

Respondent.

REBUTTAL BRIEF FOR PETITIONER

POINT I

Petitioner assumed the ordinary risks of his occupation as fire watch of which negligence of the owner or master is not one. (Answering respondent's Point III).

It is conceded that the owner's negligence caused the fire and had there been no fire there would have been no explosion. It is uncontradicted that before the explosion the stevedore foreman complained to the ship's agent about the conditions in the refrigerator space. The ship's agent thought a chemist should be called and blowers put into operation to dissipate the gas. However, prior to the explosion no blowers were in operation. The stevedores continued with their work and were permitted to smoke in the area. Nevertheless respondent contends petitioner assumed the risk of an explosion when he went to the aid of the stevedores and inspected the freeze box as this was one of the usual risks of his calling. No cases or statutes are cited.

This argument was disposed of by the court in *Roberts* v. *United Fisheries Vessels Co.*, 1 Cir., 141 F. 2d 288 at pages 292, 293:

> "He is held to assume the ordinary risks of his occupation, of which negligence of the owner or master is not one. This is true under the Jones Act as well as under the general maritime law (Citing cases). * * * The presence or absence of negligence governs the verdict. If there is no negligence the plaintiff cannot recover. If the defendant is negligent he cannot avoid the effect of it by pleading assumption of risk. Such a defense is absolutely 'out of the window' since the statute and since the decision in *Tiller* v. *Atlantic Coast Line Co.*, 318 U. S. 54, 63 S. Ct. 444, 453, 87 L. Ed. 610, 143 A. L. R. 967."

POINT II

Respondent's argument equating petitioner with a workman employed aboard to repair or inspect an unseaworthy appliance is invalid. (Answering respondent's brief, page 10).

It is urged that the warranty of seaworthiness did not extend to petitioner because it was part of his duty to inspect the admittedly unseaworthy refrigerator space. Respondent relies upon *Bruszewski* v. *Isthmian Steamship* Co. (3 Cir.), 163 F. 2d 720 and *Byars* v. *Moore-McCormack Lines* (2 Cir.), 155 F. 2d 587.

In those cases shoreside workers were injured while correcting unseaworthy conditions that were "obvious and notorious." Here as respondent emphasizes "no one knew * * * or suspected a smoldering within the walls of the refrigeration rooms" (Respondent's Brief, p. 5).

Petitioner submits that this vital difference in the factual situation leads to quite different results.

The rule applicable here is stated in *Dixon* v. *United States,* 120 F. Supp. 747 aff'd 219 F. 2d 10 (1955). There the chief mate sued for injuries sustained while inspecting a ladder which had been repaired to ascertain if the shoreside workers had made it seaworthy. The respondent there, as in the instant case, urged there could be no recovery because it was his duty to locate and eliminate the unseaworthy condition that caused his injuries.

The District Court held at page 749:

> "The respondent relies heavily upon *Bruszewski* v. *Isthmian S. S. Co.,* 3 Cir., 163 F. 2d 720 and *Byars* v. *Moore-McCormack Lines, Inc.,* 2 Cir., 155 F. 2d 587. Factually, I do not believe these cases are apposite. In both instances the employees, both of them shoreside, were engaged to repair the condition which was the direct cause of the injury and were warned or chargeable with knowledge of the dangers. The defective condition *was obvious and notorious. Here the condition was latent and unknown.*" (Emphasis added)

And at page 750:

> "Our own Court of Appeals in *Becker* v. *Waterman S. S. Corp.,* 2 Cir., 179 F. 2d 713, 714, was careful to limit the effect of the Byars case to the situation of a repairman of an independent contractor injured by that which he was to repair."

In a footnote to the opinion it was pointed out that:

> "In the Byars case the theory of unseaworthiness was never litigated or raised on appeal. Perhaps accounting for this is the fact that *Seas Shipping Co.* v. *Sieracki, supra,* extending the doctrine beyond actual seamen, was not handed down by the Supreme Court until after argument was heard in the Court of Appeals in Byars."

In affirming, the Court of Appeals held at page 16:

> " • • • American courts have uniformly refused to allow assumption of risk as a defense to a seaman's

action for injuries under the general maritime law. See discussion in *The Arizona* v. *Anelich* (1936), 298 U. S. 110, 56 S. Ct. 707, 80 L. Ed. 1075; *Socony-Vacuum Oil Co.* v. *Smith* (1939), 305 U. S. 424, 59 S. Ct. 262, 83 L. Ed. 265. Hence, even though it was part of Dixon's duty to check the ladder and he had proceeded to the job with actual knowledge of the dangerous condition of the upper rungs, the shipowner could not have said that Dixon thereby assumed the risks involved. (See *Becker* v. *Waterman S. S. Corp.*, 2 Cir. (1950), 179 F. 2d 713.) * * * "

Petitioner, like Becker and Dixon, was not in the position of Byars, a repairman injured by an "obvious and notorious" defect which he was employed to repair. As in *Dixon* the defect here was "latent and unknown." The trial court found there was no evidence that any one knew until after the explosion that the cork insulation in the wall of the freeze box had been smoldering progressively since the fire, creating an explosive atmosphere consisting of carbon monoxide and other unknown gases (19a; 27a). It would seem quite clear that the decisions in *Becker* and *Dixon* and not *Byars* and *Bruszewski* are controlling.

POINT III

Even under real property concepts a fire watch is a business visitor and not a licensee. (Answering respondent's Brief, Point II).

Respondent urges that McDaniel as a fireman was a licensee who assumed the risk of his calling and was owed no duty of reasonable care.

While respondent's obligations to McDaniel should be determined under applicable principles of maritime law and not under shoreside concepts of a "licensee," even those shoreside concepts do not support respondent's position.

The early view that injured fireman should have no recourse for injuries sustained in *fighting* fires was probably best expounded in *Lunt* v. *Post Printing Co.*, 48 Colo. 316, 110 Pac. 203 (1910) where the Court said:

> "In times of conflagration, or indications thereof, ordinary people lose their power of judgment and are not qualified to direct. Owners of property whereon are indications of fire, will and should be, for the time, suspended from control and the trained firemen, as the representatives of the public, be in absolute command, unhampered by the wishes or directions of any individual."

That is not the situation in the case before this Court. The Lisholt fire was considered extinguished, the fire-fighters had retired from the scene, the vessel was in full control of her master and crew, and at 4:00 p. m., 16 hours after the fire started and 8 hours after it was considered extinguished, petitioner came aboard to stand watch.

As to the actual fire-fighting scene in the *Lunt* case, even under the conditions precedent to the application of that rule, a rule which the Court admitted was "harsh", *id.*, 337, it was roundly criticized in an article entitled *"The Duty of a Landowner Toward Those Entering His Premises On Their Own Right,* 69 U. Pa. L. Rev. 142, 352, fn. 25," Professor Bohlen said of the *Lunt* case:

> "And while the 'stress and excitement' of a fire and the necessity of prompt decision would naturally create an emergency which would excuse mere errors of judgment, it is submitted that a fireman while performing his duties is not a chartered libertine free to injure private property at his own whim and caprice, and should not be made an outlaw and a wolf's head to whom no man owes any duty of care.
>
> "The very fact that the Colorado Court thought it necessary to bolster up its principal theory by arguments so manifestly unsound of itself lessens the weight of its opinion."

It is submitted that had petitioner been injured aboard this foreign vessel even while engaged in the emergency of extinguishing a raging fire, the application of the rule respondent urges would be "harsh" and "unsound".

Respondent introduces the trespasser-licensee-invitee concepts. These terms, as used in connection with real property, are defined and well explained in the Restatement of Torts. Under the Restatement of Torts, petitioner by analogy to the land rules is not a "licensee"—as respondent urges—but a "business visitor". Section 343 of the Restatement sets forth the liabilities of the land owner to a "business visitor" and in "Comment (d)" states:

> "d. When the presence of an *inspector or other official* on the land is necessary to the possessor's lawful conduct of his business, the official is a business visitor of the possessor and, as such, entitled to the protection stated in § 343." [emphasis added]

Petitioner was therefore, in any case, a "business visitor". He was lawfully aboard and engaged in the ship's normal business of standing watch and was a "business visitor" under the general real property rules. If emphasis is to be given to his fire department employment, then he was a "business visitor" in the special sense of an "inspector or other official", and not a firefighter, aboard to help the ship comply with the maritime and local requirements to provide a "fire watch" at all times in port.

Section 343 of the Restatement of Torts makes a landowner liable for injuries to "a business visitor" resulting from "a natural or artificial condition" which the landowner knew or should have known involved an unreasonable risk.

This Restatement rule was expressly approved by Judge Learned Hand in *Grillo* v. *Royal Norwegian Government*, 139 F. 2d 237 (2 Cir. 1943) and *Puleo* v. *H. E. Moss & Co.*, 159 F. 2d 842 (2 Cir. 1947).

Appropriate here is the language of Judge Cardozo when speaking for the New York Court of Appeals in *Wagner v. International Ry. Co.*, 232 N. Y. 176:

> "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore these reactions of the mind in tracing conduct to its consequences. It recognizes them as normal. It places their effects within the range of the natural and probable. The wrong that imperils life is a wrong to the imperilled victim; it is a wrong also to his rescuer. The state that leaves an opening in a bridge is liable to the child that falls into the stream, but liable also to the parent who plunges to its aid (*Gibney* v. *State of N. Y.*, 137 N. Y. 1). The railroad company whose train approaches without signal is a wrongdoer toward the traveler surprised between the rails, but a wrongdoer also to the bystander who drags him from the path (*Eckert* v. *L.I.R.R. Co.*, 43 N. Y. 502. Cf. *Matter of Waters v. Taylor Co.*, 218 N. Y. 248). The rule is the same in other jurisdictions (*Dixon* v. *N. Y., N. H. & H. R. R. Co.*, 207 Mass. 126, 130, and *Bond* v. *B. & O. R. R. Co.*, 82 W. Va. 557, with cases there cited. Cf. 1 *Beven on Negligence*, 157, 158). The risk of rescue, if only it be not wanton, is born of the occasion. The emergency begets the man. The wrongdoer may not have foreseen the coming of a deliverer. He is accountable as if he had (*Ehrgott* v. *Mayor, etc., of N. Y.*, 96 N. Y. 264, 280, 281)."

November 20, 1958.

Respectfully submitted,

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